

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Christopher Espinosa, Executive Fellow
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Pre-notice of Amendments to Regulation 18537.1 – Carry Over of Contributions

Date: January 24, 2006

I. EXECUTIVE SUMMARY

This memorandum addresses proposed amendments to regulation 18537.1 under the Political Reform Act (the “Act”),¹ relating to the “carry over” of contributions in a “subsequent election for the same elective state office.” Staff proposes amendments to this regulation in order to add clarifying language reflecting the Commission’s interpretation of section 85317 as applied to primary and general elections.

Currently, the regulation defines “subsequent election for the same elective state office” as “*the election to the next term of office immediately following the election/term of office for which the funds were raised.*” Historically, the existing regulation as written has always been interpreted to include both primary and general elections. However, the current regulation does not explicitly state that carry over is permissible where funds are raised for a primary election to the general election or from a special primary election to a special general election. Therefore, regulation 18537.1 as currently written is silent on how money carried over from a primary election to a general election should be treated. This lack of specificity has caused some confusion among interested parties who are affected by this regulation.

A secondary issue that staff seeks to address is to clarify how this regulation should apply to a candidate who establishes a campaign bank account for an election but does not file the necessary documents to appear on the ballot in that election, or who withdraws from an election before that election takes place. It has come to the attention of the Commission that candidates have established multiple committees for multiple elective offices before deciding which elective office to seek during that campaign year.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All references are to the Government Code unless otherwise indicated.

Under the current regulation, these candidates may carry over the funds to a new committee without attribution during the next election year, thus potentially doubling their contributions from a single contributor.

To address the first issue, proposed regulatory amendments would expressly provide that “subsequent election for the same elective state office” also refers to: (1) the general election, which is subsequent to and connected to the primary election for which the funds were raised; or (2) the special general election, which is subsequent to and connected to the special primary election for which the funds were raised.

To address the second issue, proposed regulatory amendments would also address how the carry over regulation would apply to the candidate who establishes a campaign bank account for an election but does not file the necessary documents to appear on the election ballot or withdraws from an election prior to an election being held. The proposed amendment would specifically prohibit the carry over of campaign funds in these situations, but would require that the funds be transferred with attribution pursuant to section 85306.

II. ISSUES AND BACKGROUND

After the passage of Proposition 34, FPPC staff attempted to determine the intent of section 85317 as there was nothing in the ballot pamphlet providing guidance to this section. Section 85317 states:

“Notwithstanding subdivision (a) of Section 85306, a candidate for elective state office may carry over contributions raised in connection with one election for elective state office to pay campaign expenditures incurred in connection with a subsequent election for the same elective state office.”

In interpreting section 85317, the main disagreement between the Commission staff and the authors of the statute was whether the “carry over” provision should be construed narrowly as recommended by Commission staff, or broadly, as recommended by the authors of the statute. Commission staff believed that the carry over provision should be applied only in the following way: to allow funds raised in a primary election to be carried over without attribution to the general election of the same term for an elective state office since these were elections to the “same office” as contemplated by the Act. This interpretation also included the carry over of contributions without attribution from a special primary to a special general election. (**Memorandum** to Commissioners regarding “Carry Over of Contributions,” July 25, 2001, and **Minutes** of the FPPC Commission Meeting, August 3, 2001.)

The authors of the language wanted to apply the statute more broadly to cover not only the carry over of funds from the primary to the general election of the same term for an elective state office, but also every case where an incumbent is running for re-election to the same elective state office. This application would allow the carry over of

contributions, without attribution, from any committee established for an election to a state elective office to a committee for re-election to that same office. Lastly, interested persons raised the issue that Proposition 34 was intended to track the federal election scheme, and that the intent of section 85317 was to allow transfers forward from the primary to the general elections and again to the re-election campaigns. (**Minutes** of the FPPC Commission Meeting, October 11, 2001.)

In adopting regulation 18537.1, the FPPC opted for the more expansive interpretation of section 85317, by defining “subsequent election for the same elective state office” as “the election to the next term of office immediately following the election/term of office for which the funds were raised.” However, there was never an expressed intent to reject carry over from a primary election to a general election as first proposed by staff. Therefore, the existing regulation has always been interpreted to allow funds raised in a primary election to be carried over without attribution to the general election of the same term for an elective state office. Concerning this issue, this amendment is solely being undertaken to provide technical clarification to the language.

The second issue concerning this proposed amendment involves candidates who establish campaign committees for multiple elective offices, then either fail to file the required documents to get placed on an election ballot or withdraw from an election prior to it taking place. This issue has come to the attention of the Commission staff and is considered a problem since the campaign funds raised during these previous campaigns maybe transferred under the current language of regulation 18537.1 without attribution during the next election campaign, thus allowing candidates to receive double contributions.

When regulation 18537.1 was initially crafted after the passage of Proposition 34, the Commission considered various options for applying this regulation to a candidate who withdraws before an election occurs. The three options proffered by FPPC staff at that time were:

1. Allow carry over of funds after an election occurs.
2. Allow carry over when a candidate withdraws from an election.
3. Prohibit the carry over of funds, but require that the funds be transferred with attribution. (**Memorandum** to Commissioners regarding “Carry Over of Contributions,” February 28, 2002.)

The third option would discourage the creation of scam committees that could double contributions. Staff pointed out in 2002 that committees had been created without any real intention to run for an office, but rather for purposes of creating a place to keep funds so that the funds would not become surplus. Staff could not guess at the time whether this sort of “manipulation” would happen again in the future. The Commission chose not to address the issue at that time. (**Minutes** of the FPPC Commission Meeting, March 14, 2002.) According to the FPPC’s Technical Assistance Division, this situation currently appears to be emerging.

III. REGULATORY AMENDMENTS

The proposed regulatory amendments would provide language clarifying the Commission's interpretation of section 85317. The amendments would clarify the meaning of "subsequent election for the same elective state office" includes the general election after the primary. Proposed amendment to regulation 18537.1(c) provides:

"For the purposes of Government Code section 85317,
"Subsequent subsequent election for the same elective state office"
means refers to:

(1) the The election to the next term of office immediately
following the election/term of office for which the funds were
raised;

(2) The general election, which is subsequent to and connected to
the primary election for which the funds were raised; or

(3) The special general election, which is subsequent to and
connected to the special primary election for which the funds were
raised."

As stated earlier, the existing regulation as written has always been construed to include both primary and general elections. However, the current regulation does not explicitly state that carry over is permissible where funds are raised for a primary election to the general election or from a special primary election to a special general election.

The proposed regulatory amendments would expressly provide that "subsequent election for the same elective state office" also refers to (1) the general election, which is subsequent to and connected to the primary election for which the funds were raised; or (2) the special general election, which is subsequent to and connected to the special primary election for which the funds were raised.

The second proposed amendment would specify how the carry over provision applies to a candidate who establishes a campaign bank account for an election but does not file the necessary documents to appear on the ballot of that election or withdraws from an election before the election takes place. The proposed new subdivision (d) provides:

"{DECISION POINT 1} (d) A candidate who [Option 1:
establishes a campaign bank account for an election but does not
file the necessary documents to appear on the ballot in that
election][Option 2: withdraws from an election prior to an
election being held] may not "carry over" campaign funds, but
may transfer with attribution pursuant to Government Code section
85306."

Proposed subsection (d) is being undertaken in an effort to limit double contributions from the same contributor as it relates to a candidate who raises campaign funds for an election, fails to get placed on the ballot, then carries over the funds to the next election for the same elective state office without attribution or a candidate who withdraws before an election takes place, then carries over those funds to the next election for the same elective state office without attribution.

Decision Point 1: This decision involves whether subsection (d) should address “withdrawn candidates” or be limited to situations where candidates establish campaign bank accounts then fail to complete the required documents to get on the election ballot. Filing the Candidate Intention (Form 501) in order to raise funds and then failing to get on the ballot is a bright line rule that makes the candidates subject to subdivision (d) clearly identifiable. On the other hand, using the broader term would allow the Commission to exclude from the carry over provision candidates who file 501s, appear on the ballot, and yet still fail to campaign or do so in a token manner. However, identifying and taking enforcement action against a “withdrawn candidate” for an alleged Political Reform Act violation may be difficult.

IV. STAFF RECOMMENDATION

The above amendments further codify the Commission’s interpretation of section 85317. Staff proposes noticing amendments to regulations 18537.1 for adoption at the April 2006 Commission Meeting.

Attachments:

Attachment 1: Proposed amendments to regulations 18537.1